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DATO BANDAR KUALA LUMPUR

v.

AHMAD JAAFAR ABDUL LATIFF

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COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA
ANANTHAM KASINATHER JCA
LIM YEE LAN JCA
[CIVIL APPEAL NO: W-01-366-2010]

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20 NOVEMBER 2012

LOCAL GOVERNMENT: *Maintenance and repair - Negligence - Breach - Allegation of - Tree fell on car causing severe injuries to driver and damages to car - Statutory duty of mayor under s. 101 Local Government Act 1976 - Whether extended to all trees in city - Whether tree posed danger to public - Absence of expert evidence - Whether respondent entitled to rely on doctrine of res ipsa loquitur - Whether respondent failed to discharge burden of proving appellant in breach of its duty of care*

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The respondent was driving his car along Jalan Duta heading towards his office. The respondent's car was on the left hand side of the road about 150 meters away before the turning into Damansara Heights. According to the respondent, a tree that was located on a private land there suddenly fell on his car causing severe injuries to him and damage to his car. The appellant is the body entrusted to administer the City of Kuala Lumpur pursuant to the Local Government Act 1976 ('the Act'). The respondent initiated an action against the appellant for breach of statutory duty and negligence, claiming that the statutory duty of the appellant under s. 101 of the Act was not limited to overseeing the trees planted by the appellant but extended to all trees in Kuala Lumpur. It was the respondent's case that the responsibility of the appellant extended to requiring the appellant to ensure that trees were properly trimmed or removed if they posed a danger to the public. The High Court, in holding that there was evidence to suggest that the tree posed a danger to the public, delivered its decision in favour of the respondent. Thus, the appellant appealed against the said decision. The appellant's arguments were (i) the precise location of the tree which occasioned the injury and

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damage was never identified by the respondent; (ii) the fact that the tree was located on private land did not in itself afford a basis for the court to invoke the doctrine of *res ipsa loquitur* in favour of the respondent; and (iii) the burden of proving that the tree in question posed a danger to the public vested with the respondent and the respondent failed to discharge this burden.

Held (allowing appeal with costs)
Per Anantham Kasinather JCA delivering the judgment of the court:

(1) The location of the tree was of primary importance since a court of law could not make a finding of fact that the tree posed a danger to the public when there was insufficient evidence as to the precise location of the tree. The trial judge erred in finding that the tree in question posed a danger to the public because "the tree was without leaves and it fell from a slope." Not every tree that is located on a slope poses a danger to the public. There was no evidence of the gradient and soil structure of the slope or any other evidence to suggest that the tree in question was unstable due to its location on the slope. The trial judge had erred in making the finding that the tree posed a danger to the public. (paras 9 & 10)

(2) The vicinity of the accident was a "kawasan pokok batai". The trial judge's finding, carried to its logical conclusion, implied that all the trees without leaves of the "batai" species located near the highway in Jalan Duta posed a danger to the public and ought to be removed. This conclusion was clearly unwarranted unless there was evidence that the trees were unstable, likely to fall across the nearby highway due to instability or being diseased. Accordingly, in the absence of expert evidence, the trial judge had erred in concluding that the tree posed a danger to the public merely because it was located on a slope and had no leaves. (para 11)

(3) This error on the part of the trial judge warranted appellate interference. The respondent failed to discharge the burden of proving that the appellant was in breach of its duty of care. The absence of expert evidence was understandable because the respondent adopted, with respect, the erroneous position that he was entitled to rely on the doctrine of *res ipsa loquitur*.

A The mere fact that the appellant did not notice "a tree without leaves standing upright in the midst of the lush green of Jalan Duta" could not serve to transfer the burden of proving that this tree posed a danger to the public from the respondent to the appellant. (para 12)

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Bahasa Malaysia *Translation Of Headnotes*

Responden telah memandu keretanya menyusuri Jalan Duta menuju ke pejabatnya. Kereta responden berada di bahagian kiri jalan tersebut kira-kira 150 meter sebelum memasuki Damansara
C Heights. Menurut responden, pokok yang terletak di tanah persendirian di situ tiba-tiba terjatuh ke atas keretanya menyebabkan responden cedera teruk dan kerosakan ke atas keretanya. Perayu merupakan badan yang diamanahkan untuk mentadbir Bandaraya Kuala Lumpur menurut Akta Kerajaan
D Tempatan 1976 ('Akta'). Responden memulakan tindakan terhadap perayu bagi pelanggaran kewajipan statutori dan kecuaian, dengan memghujahkan bahawa kewajipan statutori perayu di bawah s. 101 Akta sahaja tidak terhad kepada pengawasan pokok-pokok yang
E ditanam oleh perayu sahaja tetapi juga meliputi kesemua pokok di Kuala Lumpur. Adalah menjadi kes responden bahawa tanggungjawab perayu juga termasuk keperluan perayu memastikan kesemua pokok dipotong atau dibuang jika ia mendatangkan bahaya kepada orang awam. Mahkamah Tinggi, dalam memutuskan
F bahawa terdapat keterangan menunjukkan bahawa pokok tersebut mendatangkan bahaya kepada orang awam, menyampaikan keputusan memihak kepada responden. Oleh itu, perayu merayu terhadap keputusan tersebut. Hujahan-hujahan perayu adalah bahawa (i) lokasi tepat pokok yang menyebabkan kecederaan dan
G kerosakan tidak dikenalpasti oleh responden; (ii) fakta bahawa pokok tersebut terletak di atas tanah persendirian tidak boleh menjadi dasar untuk mahkamah menggunapakai doktrin *res ipsa loquitur* memihak kepada responden; (iii) beban membuktikan pokok tersebut mendatangkan bahaya kepada orang awam terletak pada
H responden dan beban tersebut gagal dilepas oleh responden.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Anantham Kasinather HMR menyampaikan penghakiman mahkamah:

I **(1)** Lokasi pokok adalah amat penting jika mahkamah undang-undang tidak dapat membuat penemuan fakta bahawa pokok tersebut mendatangkan bahaya kepada orang awam apabila

tidak terdapat keterangan yang mencukupi mengenai lokasi tepat pokok. Hakim bicara khilaf dalam memutuskan bahawa pokok tersebut mendatangkan bahaya kepada orang awam kerana "pokok itu tidak mempunyai daun-daun dan terjatuh dari kawasan yang cerun". Bukan semua pokok yang lokasinya di atas cerun mendatangkan bahaya kepada orang awam. Tiada keterangan mengenai kecerunan dan struktur tanah atau apa-apa keterangan lain untuk menunjukkan bahawa pokok tersebut tidak stabil kerana lokasinya yang berada di lereng. Hakim bicara telah khilaf dalam memutuskan bahawa pokok tersebut mendatangkan bahaya kepada orang awam.

(2) Kawasan sekitar kemalangan adalah "kawasan pokok-pokok batai". Dapatan hakim bicara, berdasarkan kesimpulan logiknya, menyiratkan bahawa semua pokok-pokok tanpa daun-daun yang datangnya daripada spesies "batai" yang lokasinya berhampiran lebuhraya Jalan Duta mendatangkan bahaya kepada orang awam dan harus dibuang. Kesimpulan ini jelas tidak wajar melainkan jika terdapat keterangan bahawa pokok-pokok tersebut tidak stabil, mungkin boleh terjatuh di lebuhraya kerana ketidakstabilannya atau berpenyakit. Sewajarnya, dalam ketiadaan keterangan pakar, hakim bicara telah khilaf apabila membuat keputusan bahawa pokok tersebut mendatangkan bahaya kepada orang awam hanya kerana ia terletak di atas cerun dan tidak berdaun.

(3) Kekhilafan hakim bicara ini mewajarkan campur tangan rayuan. Responden gagal melepaskan beban membuktikan bahawa perayu telah melanggar kewajipan berjaga-jaga. Ketiadaan keterangan pakar adalah difahami kerana responden telah memakai kedudukan yang salah bahawa responden berhak bergantung kepada doktrin *res ipsa loquitur*. Fakta bahawa perayu tidak perasan "pokok tanpa daun berdiri di tengah-tengah kehijauan yang subur di Jalan Duta" tidak boleh memindahkan beban membuktikan bahawa pokok tersebut mendatangkan bahaya kepada orang awam daripada responden kepada perayu.

Case(s) referred to:

Mahari Endut v. Dato' Hj Mat Razali Kassim, Pegawai Pengurus Pilihan Raya Bagi Kawasan Dewan Undangan Negeri N15 Ladang & Ors [2009] 4 CLJ 488 FC ***(refd)***

A **Legislation referred to:**
Local Government Act 1976, s. 101

For the appellant - Harikannan Ragavan; M/s Jayadeep Hari & Jamil
For the respondent - Prem Ramachandran (Tan Kai Sin with him); M/s Kumar Partnership

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[Appeal from High Court, Kuala Lumpur; Civil Suit No: S5(4)-21-104-2002]

Reported by Suhainah Wahiduddin

C

JUDGMENT

Anantham Kasinather JCA:

D **Background Facts**

[1] The respondent was driving his Proton Perdana No. KHJ 2676 along Jalan Duta on 2 October 2000 at approximately 5pm heading towards his office situated at Shell Malaysia Trading Sdn E Bhd in Damansara Heights. It was raining on that day. The respondent's car was on the left hand side of the road about 150 meters away before the turning into Damansara Heights. According to the respondent, a tree that was located on private land suddenly fell on his car causing severe injuries to him and F damage to his car.

[2] The appellant is the body entrusted to administer the city of Kuala Lumpur pursuant to the Local Government Act 1976. The respondent initiated an action against the appellant for breach of statutory duty and negligence. On 10 May 2010, the matter G proceeded to trial only on the issue of liability. On 18 May 2010, the High Court delivered its decision in favour of the respondent giving rise to the present appeal.

Respondent's Claim

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[3] The gist of the respondent's claim was that the statutory duty of the appellant under s. 101 of the Local Government Act was not limited to overseeing the trees planted by the appellant but extended to all trees in city of Kuala Lumpur. In other words, I a tree irrespective of who planted the same and irrespective of its location ie, on private land, continued to be under the

responsibility of the appellant. It is the respondent's case that the responsibility vested upon the appellant pursuant to s. 101 of the Local Government Act extended to requiring the appellant to ensure that trees were properly trimmed or removed if they posed a danger to the public. Any failure on the part of the appellant to do this would result in the appellant being held liable if the danger should materialise into an accident, as in this case. As regards the need to prove that the tree was a danger to the public, learned counsel for the respondent submitted in para. 30 of his written submission:

> that by applying the doctrine of *res ipsa loquitor*, the burden is shifted to the appellant to prove otherwise.

The Federal Court case of *Mahari Endut v. Dato' Hj Mat Razali Kassim, Pegawai Pengurus Pilihan Raya Bagi Kawasan Dewan Undangan Negeri N15 Ladang & Ors* [2009] 4 CLJ 488; [2009] MLJU 392 was cited in support of this proposition.

Defence Of The Appellant

[4] The first line of defence was that the precise location of the tree which occasioned the injury and damage was never identified by the respondent. Indeed, the learned trial judge acknowledged that the respondent had failed to identify the precise location of the tree in question. Learned counsel for the appellant submitted that in such circumstances, it was impossible for the respondent to allege that this tree had posed a danger to the public. Secondly, counsel for the appellant submitted that the fact that tree was located on private land (a premise which he conceded), did not in itself afford a basis for the court to invoke the doctrine of *res ipsa loquitur* in favour of the respondent. The final submission of counsel for the appellant was that once it is acknowledged that the doctrine of *res ipsa loquitur* does not avail the respondent, the burden of proving that the tree in question posed a danger to the public vested with the respondent and this burden the respondent failed to discharge. To the extent that the learned trial judge's finding was that this burden had been discharged, the learned trial judge had erred in a material way warranting appellate interference since this finding is one of mixed fact and law.

Decision Of The High Court

[5] Based on the report produced by the appellant following the investigation of the accident, the appellant concluded that the tree in question must have been located in either Lot 76 or Lot 8262. The premise for this finding was the discovery of two trees stumps in each of these lots. However, DW2 who conducted this investigation was uncertain as to which of the two stumps belonged to the tree which fell in this case.

[6] The learned trial judge, with respect, appears to have addressed the location of the tree from the perspective of whether it was located on private or public land only. We opine to this effect because the appellant adopted the position during the trial that its duty of care did not extend to trees located on private land. Following His Lordship's ruling that, in law, the duty extended to trees located on private land, His Lordship did not proceed to address the issue of whether the precise location of the tree was relevant to the issue of the tree posing a danger to the public.

[7] As regards the applicability of the doctrine of *res ipsa loquitur* to the facts of this case, it is clear from a close examination of the judgment of the High Court that the learned trial judge did not invoke the doctrine of *res ipsa loquitur* in favour of the respondent. This is clear from the following passage of the judgment of His Lordship:

> The burden is certainly on the plaintiff to prove negligence on the part of the defendant or that there was a breach of statutory duty by the same. The defendant contends that it is incumbent on the part of the plaintiff to prove that the tree is dangerous or diseased in order to bring an action of this nature as suggested by some of the authorities referred to by the learned counsel.

[8] The learned trial judge having correctly refused to invoke the doctrine of *res ipsa loquitur*, then proceeded to inquire as to whether the respondent had discharged the burden of proving that the tree in question posed a danger to the public. On this issue, His Lordship held this to be the case for these reasons:

> On the totality of the evidence before me, I find that there is evidence to suggest that the tree posed a danger to the public. Beside being on a slope, the tree is about 25 meters tall and without leaves. It really surprises one to note that DBKL, in

particular the Unit Pengurusan Pokok Rendang has failed to notice this. If what has been alleged by DW1 and DW2 as to the regular patrol and inspection, surely the unit would have noticed this 25 meter tree without leaves standing on the slope. It should have attracted their attention. A tree without leaves standing upright in the midst of the lush green of Jalan Duta should never escape the attention of the unit. The duty imposed by section 101 of the Local Government Act 1976 includes regular checks on trees and if regular checks has been done why is that such a situation was not even noticed. Further, the defendant has also failed to proffer any evidence to suggest that regular patrols and inspection has actually been done. No record of any sort was shown. In any event, the report prepared by the defendant clearly shows that tiada selenggaraan kerana pokok dalam tanah persendirian.

Decision Of The Court

[9] In our judgment, the location of the tree is of primary importance since a court of law cannot make a finding of fact that the tree posed a danger to the public when there is insufficient evidence as to the precise location of the tree. With respect, it is apparent from His Lordship's judgment that the respondent had failed to produce evidence as to the precise location of the tree in question. This is evident from the following passage in the judgment of His Lordship:

DW2 the Penolong Pegawai Pertanian Dewan Bandaraya prepared a report about the accident in 2003 together with one Nor Azman Abbas after the writ was filed by the plaintiff in this case. In preparing the report, DW2 was not able to determine the exact location of the tree. They identified 4 plots of land and the report is produced in Lampiran 60, a part of the common bundle of documents. The report is a very sketchy one. It does not say much and it and is called Laporan Pokok Tumbang di Jalan Duta. The report was made on the 12th February 2003 and reads:

Tarikh kejadian	:	2nd October 2000 pukul 6 petang
Tempat Kejadian	:	Tepi Jalan Duta
Hak Selenggara	:	pokok batai tinggi 20 meter. Tumbuh di lereng bukit di dalam tanah persendirian di Lot No. 76 & No. 8262
Kerosakan harta dan nyawa awam	:	pokok tersebut telah menimpa Encik Ahmad Jaafar bin Abdul Latiff.

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Punca Kejadian	:	Hari hujan lebat dan angin ribut
Selenggara pokok	:	tiada selenggaraan kerana pokok dalam tanah persendirian

[10] In other words, as explained earlier in this judgment, the
B ruling of the learned trial judge that the duty of care imposed on the respondent extended to trees grown on private land did not absolve the learned trial judge of the need to then consider whether the tree posed a danger to a public having regard to its location. In our judgment, with respect, the learned trial judge
C erred in holding that the tree "fell from a slope" based on the evidence of PW2 and that "the tree was on a slope of a hill as admitted on the defendant's report" based on the evidence of DW2 after acknowledging earlier in the judgment of His Lordship that "DW2 only assumes that the tree which fell on the plaintiff's
D car three years before was on this private land". In our judgment, in the face of this conflicting evidence regarding the precise location of the tree in question, the learned trial judge erred in making the finding that the tree posed a danger to the public.

E **[11]** Now, even if we are wrong in disturbing the aforesaid finding of the learned trial judge concerning the relevance of the location of the tree, in our opinion, the learned trial judge erred in His Lordship's finding that the tree in question posed a danger to the public because "the tree was without leaves and it fell from a
F slope". With respect, first, not every tree that is located on a slope poses a danger to the public. This is particularly so when there is no evidence of the gradient and soil structure of the slope or any other evidence to suggest that the tree in question was unstable due to its location on the slope. Secondly, not every tree
G that has no leaves poses a danger to the public. In our judgment, it was imperative for the respondent to have led evidence, preferably expert evidence that a tree of this species is normally diseased if it has no leaves. We are constrained to make this observation because the species of the tree was identified and the
H weather in question at the material time was acknowledged to be "hari hujan lebat dan angin ribut". Indeed, according to the unchallenged evidence of DW2, the vicinity of the accident was a "kawasan pokok batai". In our opinion, with respect, this finding of the learned trial judge carried to its logical conclusion implies
I that all the trees without leaves of the 'Batai' species located near the highway in Jalan Duta pose a danger to the public and ought

to be removed. This conclusion is clearly unwarranted unless there is evidence that the trees are unstable, likely to fall across the nearby highway due to instability or being diseased. Accordingly, in our judgment, in the absence of such expert evidence, the learned trial judge erred in concluding that the tree posed a danger to the public merely because it was located on a slope and had no leaves.

[12] In our judgment, this error on the part of the learned trial judge warranted appellate interference. We opine to this effect because in the absence of such evidence, the respondent can be said to have failed to discharge the burden of proving that the appellant was in breach of its duty of care. The absence of expert evidence is understandable because the respondent adopted, with respect, the erroneous position that he was entitled to rely on the doctrine of *res ipsa loquitur*. It is also our considered view that the mere fact that the appellant did not notice "a tree without leaves standing upright in the midst of the lush green of Jalan Duta" (to use the words of His Lordship) cannot serve to transfer the burden of proving that this tree posed a danger to the public from the respondent to the appellant.

[13] For the aforesaid reasons, we allowed this appeal with costs and set aside the order of the learned trial judge. The respondent to pay costs of RM2,000 to the appellant. Deposit refunded to the appellant.